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No. 90-162

In the Supreme Court of the United States

OCTOBER TERM, 1990

ROCKFORD MEMORIAL CORPORATION, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

CORRECTED COPY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that petitioners' agreement to merge violated Section 1 of the Sherman Act.

2. Whether the district court's determinations of the relevant geographic and product markets were clearly erroneous.

3. Whether the lower courts erred in finding a merger presumptively unlawful based on market concentration measured in several different ways, where both courts also addressed other relevant competitive factors before declaring the merger unlawful.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. b1-b46) is reported at 898 F.2d 1278. The opinion of the district court (Pet. App. a1-a286) is reported at 717 F. Supp. 1251.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 1990. The petition for a writ of certiorari was filed on July 2, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September 1987, petitioners, who own two of the three general acute care hospitals in Rockford, Illinois, agreed to consolidate. The government sued to prevent this merger, claiming that it would diminish competition in acute inpatient hospital care in the Rockford area, in violation of both Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 1 of the Sherman Act, 15 U.S.C. 1. After a 13-day trial, the district court entered judgment in the government's favor and permanently enjoined the transaction.[1] The court entered a 108-page opinion (accompanied by 41 pages of additional findings of fact) concluding that the challenged transaction violated Section 7 of the Clayton Act. Pet. App. a1-a286.

a. The court held that Section 7 of the Clayton Act applied to the challenged transaction despite petitioners' not-for-profit status. It read *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), as ruling that Section 7 covered, with respect to all persons (including not-for-profit corporations), "the entire amalgamation of corporate mergers, from pure stock acquisitions to everything up to, but not including, a pure asset acquisition not accomplished by merger." Pet. App. a17, citing *Philadelphia Nat'l Bank*, 374 U.S. at 343-344. Accordingly, because the challenged transaction was not a pure assets acquisition not accomplished by merger, it was within Section 7. Pet. App a7-a35. The court therefore did not reach the government's Sherman Act claim. *Id.* at a211 n.22.

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[1] Amicus City of Rockford overlooks the fact that the injunction was a permanent one. For that reason, the City errs in arguing, City Br. 26-30, that the court of appeals misapplied the standard for entering a preliminary injunction.

b. The court then determined the relevant product market for analyzing the competitive impact of the merger. See Pet. App. a36-a53. Quoting from *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962), the district court began with the principle that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." Pet. App. a37. It then reasoned that "[t]he purpose of defining a market based on a product's interchangeability with respect to other products is to distill the product market into a product or group of products sufficiently distinct that buyers could not defeat an attempted exercise of market power on the part of the sellers of these products by shifting purchases to different products." *Id.* at a37-a38.

With those guideposts, the court considered the government's contention that the relevant product market was acute inpatient hospital care and petitioner's contention that the relevant product market included both inpatient and outpatient care provided by all health care providers. The court recognized that developments in technology over time had led to substitution of outpatient care for inpatient care, Pet. App. a41-a42, but it distinguished that pattern of substitution from the substitutability relevant to product market definition. The court concluded that cost containment pressures generally limited the use of inpatient care to those "too 'sick' to receive outpatient care," so that "to a great extent, patients now receiving inpatient care could not have received outpatient care as a substitute." *Id.* at a43.[2] Ac-

[2] The district court relied on evidence that third-party payors insisted that patients be admitted to hospitals only

cordingly, the court concluded, as had the defendants' own economist,[3] that the relevant product market was acute inpatient hospital care. *Id.* at a48, a52-a53.

c. The court began its analysis of the geographic market by noting that the relevant geographic market is the "area in which the seller operates, *and to which the purchaser can practicably turn for supplies.*" Pet. App. a53-a54 (quoting *Philadelphia Nat'l Bank*, 374 U.S. at 359, quoting in turn *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961)) (emphasis added by the district court). The court then drew on this Court's refinements of the concept in *Philadelphia Nat'l Bank* and *Brown Shoe*. In applying those standards, the court relied on a variety of different types of evidence, such as the admitting practices and preferences of physicians, patients, and third-party payors, Pet. App. a54-a59, the relatively limited scope of services provided by other hospitals in the area surrounding Rockford, *id.* at a62-a63, and county- and zip code-level data concerning the origins and destinations of patients—that is, data indicating the geographic areas from which hos-

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when medically necessary. Pet. App. a42-a43, a236-a240. Thus, the court reasoned that the number of inpatients who could "possibly utilize outpatient care" was not "significant enough to break an exercise of market power in the inpatient care market." *Id.* at a51.

[3] The defendants' economist, Dr. Lynk, testified that acute inpatient hospital services are a reasonable, economically justifiable product market within which to assess the future competitive consequences of the consolidation, that most economists who study the hospital industry consider it to be the product market definition most relevant for analysis of hospital competition, and that he was aware of no basis for requiring a broader product market definition that would include outpatient services. Tr. 1195-1199.

pitals draw their clients for acute inpatient care and the hospitals to which residents of various geographic areas go for acute inpatient care, *id.* at a64-a131. Recognizing that determination of the relevant geographic market is inherently imperfect, *id.* at a124, the court found that the relevant geographic market was an area including some or all of six counties, within which there were six hospitals. *Id.* at a131-a132. That geographic market was larger than the one proposed by the government and smaller than the one proposed by the defendants.

d. The court then found that the proposed consolidation would greatly increase concentration within the market it had defined and would result in an extremely high level of concentration, whether measured by beds, admissions, or patient days. Pet. App. a145-a149. Whatever measure is chosen, the merged hospitals would have at least a 64% share of the market; the share of the two largest hospitals would increase from approximately two-thirds to 90%. *Id.* at a147-a148; see also *id.* at a209-a210. In light of such cases as *Philadelphia Nat'l Bank*, the court concluded that this increase in concentration meant that one firm would control an undue percentage share of the market. *Id.* at a152-a153.

The court, however, did not rest its analysis of the likely anticompetitive effect of the merger entirely on market shares. The court examined barriers to entry into the market, Pet. App. a154-a161, and concluded that legal bariers to both de novo entry and expansion by existing competitors reinforced the likely anticompetitive tendencies indicated by concentration levels before and after the merger, *id.* at a161. It examined the "type of competition that exists in the acute inpatient hospital market in order

to determine whether the market is susceptible to anti-competitive behavior," *ibid.*, and concluded that "hospitals in the relevant market could benefit from a variety of anti-competitive activity." *Id.* at a167. It noted a prior instance of anticompetitive collusion by all three Rockford hospitals, *id.* at a178-a181, and the merging hospitals' perception that competition threatened them, *id.* at a181-a183, and concluded that not-for-profit entities do not lack incentives to behave anticompetitively. *Id.* at a167-a176. Thus "[b]ased on an examination of the relevant market's concentration, barriers to entry, nature of competition, and market participants," the court found that "the post-merger market is ripe for anti-competitive behavior." *Id.* at a184; see also *id.* at a210.[4]

2. The court of appeals affirmed. Pet. App. b1-b46. It concluded that "*as the parties have framed the issues* the merger is not subject to section 7" of the Clayton Act, even though there was a "solid argument, based on section 11 of the Clayton Act," that the merger was subject to Section 7 of that law. Pet. App. b17-b18.[5] The court of appeals decided this

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[4] The court also considered the significance of opposition to the merger by the third hospital in Rockford, St. Anthony's, concluding that St. Anthony's might well fear exclusionary behavior by the merged hospitals rather than the emergence of a more efficient competitor, but that in any event a competitor's opposition was not dispositive. Pet. App. a184-a187.

[5] In the district court and the court of appeals, the government had argued that the merger was subject to Section 7 of the Clayton Act, relying on the theory that the district court accepted. The government did not rely on Section 11 of the Clayton Act, 15 U.S.C. 21, in the district court, and the court of appeals held the government had waived that argument. Pet. App. b14. Accordingly, the argument made by amicus Voluntary Hospitals of America, Inc. (VHA), that

case under Section 1 of the Sherman Act because "the subordinate findings that the judge made demonstrate a section 1 violation" and because both sides had briefed and argued the Sherman Act issue. Pet. App. b18-b19. The court of appeals accordingly found it unnecessary to decide whether the district judge was correct in holding that Section 7 of the Clayton Act reaches mergers between nonprofit corporations. Pet. App. b44-b45. The court of appeals also discussed the question whether, as pertinent here, the standards of Section 1 of the Sherman Act and Section 7 of the Clayton Act have "converged," Pet. App. b19-b27,[6] but the court held that, regardless of the answer to that question, this transaction was unlawful under Section 1 of the Sherman Act, as interpreted in *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948). Pet. App. b27-b28. The court explained that the resulting level of concentration here would be far higher than that in *Columbia Steel*, and that conditions in the hospital industry "reinforce rather than undermine the inference naturally to be drawn from [petitioners'] combined market share." *Id.* at b28.

The court of appeals upheld the district court's product market determination, observing that com-

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the court of appeals misconstrued Section 11 of the Clayton Act, VHA Br. 13-16, is irrelevant to this case.

[6] The court of appeals stated that standards for determining the legality of a merger under Clayton Act Section 7 and Sherman Act Section 1 have converged through judicial interpretation. Pet. App. b20. Consequently, the court said, in light of *United States* v. *First National Bank & Trust Co.*, 376 U.S. 665 (1964), a merger likely to hurt consumers by facilitating collusion and supracompetitive pricing would be unlawful under either law. Pet. App. b23-b25.

petition between inpatient and outpatient care in some services offered by acute care hospitals provides no check on the ability of hospitals to raise prices for services not available on an outpatient basis. Pet. App. b31-b33. The court of appeals also upheld the district court's geographic market determination. The court of appeals concluded that, while the district court's determination was imperfect and subject to "pot shots," it was not clearly erroneous, whereas petitioner's proposal was "ridiculous," *id.* at b37, b38. Finally, the court noted that "[petitioners'] immense shares in a reasonably defined market create a presumption of illegality," and that, as in *Hospital Corp. of America* v. *FTC*, 807 F.2d 1381 (7th Cir. 1986), cert. denied, 481 U.S. 1038 (1987), the inference of market power drawn from market shares was strengthened by many other factors in this case. Pet. App. b38. The court specifically considered the significance of petitioners' non-profit status, concluding that petitioners had presented no evidence that "non-profit suppliers of goods or services are more likely to compete vigorously than profit-making suppliers." *Id.* at b40-b41.

ARGUMENT

1. Petitioners' principal claim is that the court of appeals erred in ruling that the standards under Section 1 of the Sherman Act and Section 7 of the Clayton Act have converged. Pet. 11-15. See also VHA Br. 16-19. But the court of appeals' discussion of that issue was not necessary to the result it reached. The court specifically held that the district court's factual findings established a violation of the Sherman Act under this Court's precedents even if the Sherman Act and Clayton Act standards have not

converged and even if the Sherman Act establishes a higher and more demanding standard. Accordingly, this case is not an appropriate vehicle for this Court to resolve the principal legal question presented in the petition.

2. There is no merit to petitioners' claim that the court of appeals, in affirming the district court's determinations of the relevant product and geographic markets, departed from this Court's decisions in *Brown Shoe* and *Tampa Electric*. Pet. 17.

a. The district court began its analysis of the relevant product market with the *Brown Shoe* concepts of reasonable interchangeability and cross-elasticity of demand. See p. 3, *supra*. The district court concluded that there generally was no outpatient substitute for most patients receiving inpatient care, and therefore that outpatient care could not prevent the exercise of market power in the inpatient care market. Pet. App. a51. The court of appeals upheld that finding and simply restated the point.

Since the courts below plainly applied the *Brown Shoe* legal standards, petitioners fall back to a conflict of factual findings, based on different records, between the district court's decision in this case and the district court's decision in *United States* v. *Carilion Health System*, 707 F. Supp. 840 (W.D. Va.) (*reprinted at* Pet. App. D), aff'd without published opinion, 892 F.2d 1042 (4th Cir. 1989) (Table) (*reprinted at* Pet. App. e1-e20).[7] A conflict between

[7] In its unpublished, per curiam opinion affirming the *Carilion* findings, the Fourth Circuit observed that "the district court may not have stated its findings [on the product market issue] with the precision that would facilitate appellate review," but nonetheless concluded that those findings

different findings by two different district courts on different records, however, does not warrant this Court's review.[8]

b. The decision below comports with this Court's precedents on the issue of the proper definition of the geographic market. Contrary to petitioners' claim, Pet. 20-21, the district court followed this Court's decision in *Tampa Electric* and asked where buyers could practicably turn for supplies. Pet. App. a53, a64-a65, a78-a121. In fact, petitioners' real complaint appears to be that the district court misapprehended a single exhibit and therefore allegedly erred in applying a particular test urged by petitioners to zip code-level patient origin and destination data, and that the court of appeals failed to reverse the district court's judgment on that ground. Pet. 20-21 & n.8. But the district court based its market analysis on many other factors as well, including county-level origin and destination data, analyzed by the district court without a similar claim of error by

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"were sufficiently set forth that we can fairly say that they are not clearly erroneous." Pet. App. e16-e17. In so ruling, the Fourth Circuit purported to apply (albeit erroneously in our view) the same reasonable interchangeability standard that the district court applied in this case. *Id.* at e14. There is, accordingly, no basis for petitioners' claim, see Pet. 17, that the decision below conflicts with the Fourth Circuit's decision in *Carilon*.

[8] The claim that the court of appeals here "treated the question of appropriate market definition as a question of law rather than as a question of fact," American Hospital Ass'n Br. 11; *id.* at 11-17, ignores that court's clear statement that market definition is reviewed as a question of fact. Pet. App. b38.

petitioners. See pp. 4-5, *supra*; Pet. App. a14-a114.[9] In any event, a question of the proper analysis of one item of evidence, already considered by two courts, does not warrant this Court's review. See, *e.g.*, *United States* v. *Doe*, 465 U.S. 605, 614 (1984); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

3. Petitioners' remaining claims rest on the erroneous assertion that the court of appeals never looked beyond market shares in holding the merger unlawful. Pet. 22. The court of appeals itself found that additional factors supported the inference of market power flowing from market shares, Pet. App. b28. The district court's analysis of additional factors was more extensive, see Pet. App. a154-184; pp. 5-6, *supra*. The court of appeals was not required to restate the district court's entire analysis in order to uphold its judgment.

a. Neither the district court nor the court of appeals disregarded the teaching of *Brown Shoe* and *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974), that "statistics on market share and concentration are not conclusive." Pet. 23. The district court explicitly treated concentration as but one of "several salient competitive factors" in the predictive determination of competitive effects, Pet. App. a139, and examined other factors at length, *id.* at a154-a184. The court thus gave concentration statistics only the presumptive effect that this Court assigned them in *Philadelphia Nat'l Bank*, 374 U.S. at 363. See Pet. App. a142-a143. Similarly, the court of appeals said that the "defendants' immense shares in a reasonably defined market" did no more than

[9] The court's county-level analysis yielded a three-county market containing the same six hospitals as the court's zip code-based market. Compare Pet. App. a117 with *id.* at a118.

"create a presumption of illegality," *id.* at b38. The court of appeals found that other factors strengthened the inferences to be drawn from these market shares, *ibid.*, and that "defendants responded [to the market share evidence] with conjectures about the motives of nonprofits, and other will o' the wisps, that the district judge was free to reject, and did," *id.* at b44.[10]

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[10] There is no basis for petitioners' suggestion that the anticompetitive effect of their merger in current markets should be ignored because the merger might increase competition with respect to certain hospital services. Pet. 23-25. Without even addressing whether merger analysis properly relies on "some ultimate reckoning of social or economic debits and credits," *Philadelphia Nat'l Bank*, 374 U.S. at 371, it is sufficient to note that petitioners' suggestion would divert a court's attention from substantial and immediate effects on competition to trying to ascertain effects in a remote and speculate future. Nothing in *Brown Shoe* or *General Dynamics* authorizes or requires a court to indulge in such speculation. Petitioners' scenario for the competitive future relies on proposed but not enacted state legislation, Pet. 23, and on their mere stated intent to strengthen their hospitals' "tertiary services," Pet. 24; see Pet. App. a187, a192. Contrary to their assertion, Pet. 10, the district court did not find that the merger would result in development of a "regional referral center." The district court merely noted that petitioners "proclaim[ed]" that this benefit would "eventually" result from the merger. Pet. App. a187. The district court concluded that the merger "*might* also allow the new entity to improve its services to the extent that it *might* become a major medical center, providing tertiary care in * * * a broader geographical area," *id.* at a206 (emphasis added).

The related argument of amicus American Medical Association (AMA) rests on extra-record materials referring to hospitals other than petitioners' hospitals, see AMA Br. 6-32, and on a view of the competitive weaknesses of petitioners' hospitals, see AMA Br. 33-36, that cannot be reconciled with

b. The district court extensively considered, and rejected, petitioners' claim that as not-for-profit entities they lacked a motive to act anticompetitively. See page 6, *supra*. The court of appeals, which had treated the motivation of not-for-profit hospitals at greater length in its earlier decision in *Hospital Corp. of America* v. *FTC*, 807 F.2d at 1390-1391, also discussed and rejected petitioners' theories. Pet. App. b40-b41. Thus, contrary to petitioners' claim, Pet. 25-27, the courts below did address the issue of motive; they simply disagreed with petitioners on that issue.[11] Petitioners' fact-bound disagreement with the lower courts' findings on that subject does not warrant review by this Court.[12]

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the district court's findings, Pet. App. a193-a194, a221-224, a226-a227.

The district court may be forgiven for ignoring Amicus City of Rockford's alleged support for the merger, see City Br. 4-5, since the then-mayor testified that the city had taken no position concerning the merger, Tr. 854.

[11] Neither *Matsushita Elec. Industrial Corp.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) (Pet. 23), nor *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) (Pet. 26), involved a merger, and neither case suggests that a court must evaluate the parties' motives to act anticompetitively where the structural effects of their merger would clearly threaten competition.

[12] The contention of amicus VHA that hospital markets generally depart from the "competitive paradigm," VHA Br. 3-13, was not raised in district court. Moreover, that argument rests almost entirely on extra-record materials, including materials postdating the court of appeals' decision, VHA Br. 9, 1a-3a, and testimony on direct examination (but not the accompanying testimony on cross-examination) given in another case, VHA Br. 9, 14a-23a. VHA's implicit argument that competition in hospital markets is undesirable because it is costly, VHA Br. 9, is properly addressed to Congress, not to the courts. See *National Soc'y of Professional Engineers* v. *United States*, 435 U.S. 679, 695 (1978).

c. The fact that the court of appeals did not explicitly address St. Anthony's opposition to the merger, Pet. 26, is irrelevant. The court of appeals had no obligation to discuss every point raised by petitioners. The district court considered this argument at length, and it found a plausible reason why St. Anthony's might rationally oppose an anticompetitive merger as exclusionary. Pet. App. a186. Moreover, the district court correctly concluded that even if St. Anthony's believed that the merger would be procompetitive, its belief would be less than decisive "where the evidence, as is true in this case, supports the anti-competitive effect of the merger." *Id.* at a186-a187. There was no need for the court of appeals to add to that discussion.[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[13] In a prior case, the court of appeals held that although a competing hospital's opposition to a merger might indicate that the competitor thought the merger would lead to lower prices, that was "just one firm's opinion," and not binding on the Federal Trade Commission. *Hospital Corp. of America*, 807 F.2d at 1392.

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